Office-Supreme Court, U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS,
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No. 80-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALLEY FORGE CHRISTIAN COLLEGE, *Petitioner,*

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.
AND
THE UNITED STATES DEPARTMENT OF EDUCATION, THE UNITED STATES OF AMERICA, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Do citizens and organizational plaintiffs without taxpayer status nevertheless have standing as citizens to maintain an action to challenge the transfer of surplus federal property to a church-related college, pursuant to the Federal Property and Administrative Services Act of 1949?

2. Can an alleged violation of a citizen's "shared right" to a government which does not establish religion, without more, satisfy the injury in fact requirement for standing under Article III?

PARTIES

In the United States District Court for the Eastern District of Pennsylvania and in the United States Court of Appeals for the Third Circuit, Americans United for Separation of Church and State, Inc. ("Americans United" or the "organization") and four of its employees, A. L. Gunn, E. T. Doerr, G. Settembrini and E. M. Binns (the "individuals"), were plaintiffs and appellants respectively; the United States Department of Health, Education, and Welfare, the United States of America (collectively referred to as the "Government") and Northeast Bible College, a/k/a Valley Forge Christian College (the "college") were defendants and appellees respectively. The designation of the college in the Amended Complaint is incorrect. The college changed its name to Valley Forge Christian College on January 1, 1977, before this lawsuit was begun (J.A. 33).

The college filed a Petition for Writ of Certiorari on August 30, 1980; the Government did not join in the filing of the petition and became respondents. Thus, the college is the sole petitioner and the respondents are the Government, the organization and the individuals. Although the Government was a codefendant and a co-appellee below, it is now a respondent supporting petitioner.

Pursuant to the Department of Education Organization Act, Pub.L.No. 96-88, 93 Stat. 668, 20 U.S.C. §3401 (1979), the Department of Health, Education, and Welfare was abolished. Under §505(e) of the Act, 93 Stat. 691, 20 U.S.C. §3505(e) (1979) the Department of Education is now the Government respondent replacing the Department of Health, Education, and Welfare.

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BRIEF OF PETITIONER

OPINIONS BELOW

The December 15, 1978 Order of the district court granting petitioner's Motion for Summary Judgment is unreported (Pet. App. A42). The three opinions of the United States Court of Appeals for the Third Circuit (majority opinion by Adams, J., concurring opinion by Rosenn, J., dissenting opinion by Weis, J.) are reported as: *Americans United for Separation of Church and State, Inc., et al.* v. *United States Department of Health, Education and Welfare, et al.* at 619 F.2d 252 (3d Cir. 1980) (Pet. App. A1).

JURISDICTIONAL STATEMENT

On April 8, 1980, the United States Court of Appeals for the Third Circuit rendered the judgment which is now before this Court for review. On June 3, 1980, the court of appeals denied petitioner's Petition For Rehearing *En Banc.* On February 23, 1981, this Court granted petitioner's Petition for

Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. I, §8, Cl. 1 — Pet. App. A49

U.S. Const. Art. III, §2, Cl. 1 — Pet. App. A49

U.S. Const. Art. IV, §3, Cl. 2 — Pet. App. A49

U.S. Const. Amend. I — Pet. App. A50

Federal Property and Administrative Services Act of 1949, 40 U.S.C. §471 et seq. (1970) Pet. App. A50-A51

STATEMENT OF THE CASE

This action was instituted after respondents, Americans United for Separation of Church and State, Inc., ("Americans United" or the "organization") and four of its employees, Gunn, Doerr, Settembrini and Binns (the "individuals"), learned from a news release that the United States had, through the Department of Health, Education & Welfare (the "Government" or "HEW"), transferred to Valley Forge Christian College (the "college") real and personal property which had been determined surplus to governmental needs. The college had applied to HEW and received this property under a previously unchallenged federal program which has been in existence for over thirty years. Through this program the Government may dispose of surplus property to health and educational institutions.

After discovery, the Government filed its Motion to Dismiss and the college filed its Motion for Summary Judgment. Both were granted by the district court which held that Americans United and the individuals lacked standing to sue under *Flast* v. *Cohen*, 392 U.S. 83 (1968). The court of appeals reversed; although it agreed that the plaintiffs lacked standing under *Flast*, it held that the interest of a citizen in a government which is obedient to the Constitution warrants standing to sue.

In 1973, the Secretary of Defense announced the closing of 274 military installations including the Valley Forge General Hospital located near Phoenixville, Pennsylvania. "[D]eclining workload, reduction of end strength of the Army, [and] economy" were among the reasons cited for closure. (C.A. App. 237-238).[1] The announcement of the hospital's closing was the result of a determination by the Department of Defense that the facility was "excess" to the requirements of all branches of the military. Following congressional clearance, the Army reported the hospital to the General Services Administration ("GSA") as "excess" to Defense needs (C.A. App. 228-231).

The facility was offered by GSA to all other federal agencies in accordance with the Federal Property and Administrative Services Act of 1949 ("Federal Property Act"), 63 Stat. 378, 40 U.S.C. §471 (1949). When there was no federal requirement for the hospital, GSA declared it "surplus" to the needs of the federal government. Ultimately it was assigned to HEW for disposal to a health or educational institution as authorized by the Federal Property Act (C.A. App. 231).

The President's Economic Adjustment Committee ("EAC") was deployed to address governmental concern over the economic impact of the closure on the Phoenixville community.[2] The EAC met with community representatives to develop a viable reuse plan for the property (C.A. App. 230-231). In mid-1976 the EAC received a report from the local use committee recommending the college as the transferee of a 76.80 acre portion of the surplus property (C.A. App. 231).

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[1] References to the Appendix filed in the court of appeals are designated "C.A. App. ____."

[2] The Phoenixville community was about to be left with a white elephant in the form of 181 acres with many unoccupied buildings. Over 700 jobs were to be lost (C.A. App. 231, 237).

The college was granted a "public benefit allowance" of 100% of the value of the property, pursuant to which the college must earn its right to use and to own the property by the bestowal of educational benefits for 30 years, 76 Stat. 805, 40 U.S.C §484(k)(1)(C) (1962). The Government retains a reversionary interest during that period which it may exercise upon finding a violation of the college's covenants (C.A. App. 267-68). The deed was executed on August 3, 1976; thereafter the college relocated its campus, renovated the property at substantial cost and began its present occupation of a portion of the acreage transferred.

Americans United learned of the transfer by a news release (Doerr Dep. 44). In December 1976, the organization and four of its staff members sued the Government in the United States District Court for the District of Columbia. The action was transferred to the Eastern District of Pennsylvania and, on July 12, 1977, an amended complaint was filed naming the college as a codefendant.

The Amended Complaint describes the taxpayer and citizen status of the individuals (J.A. 10, ¶3-6) and pleads the representational status of the organization, alleging that each of its taxpayer members is affected as though each were a separate individual plaintiff in the action (J.A. 10, ¶2). The college is alleged to be a "theological school" to which the transfer of federal property is unlawful under the first amendment (J.A. 11, ¶¶9, 12). The relief sought is a declaration that the transfer was illegal, recission, injunctive relief and attorneys' fees (J.A. 12).

Americans United claims to be one of the principal organizations in this nation which defends and promotes religious liberty (C.A. App. 155); it purports to speak on behalf of some "90,000 members nationwide" (J.A. 10, ¶2). Litigation is one of the two ways in which Americans United fulfills its organizational purpose. Education is the other activity which fulfills its organizational goals (C.A. App. 150).

Following discovery[3] the college moved for summary judgment (J.A. 181) and the Government moved to dismiss pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure (J.A. 185). Both motions addressed solely the issue of respondents' standing.

On December 15, 1978, the district court granted the motions. The court found that the plaintiffs failed to meet the *Flast* criteria for taxpayer standing since the Federal Property Act is an exercise of the property power of the Constitution, and not an exercise of the taxing and spending power. The court also held that plaintiffs' injury was neither actual nor concrete, but was a generalized grievance. The complaint was dismissed (Pet. App. A42).

The organization and the individuals appealed and on April 8, 1980, the court of appeals filed three opinions (majority, concurring and dissent) and, in reversing the district court, held that both Americans United and the individuals had standing to maintain the claim.

In its majority opinion, the court of appeals:

(a) agreed with the district court that the respondents lacked standing to sue under *Flast;*

(b) held that a claim (never alleged in the district court) to a "shared individuated right" to a government that does not establish religion is a direct or concrete injury warranting Article III standing;

(c) stated that citizens who hold a separationist view of the Establishment Clause have a special interest which dis-

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[3] Interrogatories addressed to the Government and to the college were answered. The college's interrogatories and request for production of documents were answered and it took depositions of the individuals. Affidavits were filed in connection with the college's Motion for Summary Judgment. The foregoing, and the pleadings, constitute the record.

tinguishes them from the citizenry at large and justifies standing; and

(d) concluded that at least some constitutional guarantees are enforceable at the demand of every citizen.

The college filed a Petition for a Writ of Certiorari on August 30, 1980; Americans United, the individuals and the Government filed briefs in opposition. The writ was granted on February 23, 1981.

SUMMARY OF ARGUMENT

Article III's case or controversy requirement is met only by plaintiffs who allege a "personal stake" in the outcome of the dispute. *Flast* v. *Cohen*, 392 U.S. 83 (1968) authorized taxpayer standing to challenge congressional action taken pursuant to the taxing and spending power of the Constitution, Article I, §8. The Federal Property Act is not an exercise of the taxing and spending power; rather that legislation is empowered by the Property Clause of the Constitution, Article IV, §3, cl. 2. Respondents fail to meet the *Flast* standing criteria, and both lower courts so held.

The court of appeals concluded, *Flast* notwithstanding, that the individuals and the organization had standing to sue as citizens who relied on their unarticulated interest as "separationists" and whose main concern was adherence to the goal of separation of church and state. Standing is predicated on the citizen-separationists' "shared individuated right" to a government that does not establish religion, which the lower court said is within the zone of interests of the Establishment Clause. A "shared individuated right" is not injury in fact. The concept conflicts with this Court's opinions on the standing doctrine and the record does not indicate that the individuals or the organization have suffered any injury as a result of the transfer of surplus federal property to the college.

Three types of personal stake have been recognized in Establishment Clause challenges: traditional injury, taxpayer injury and direct offense. Never has a plaintiff been granted standing solely on the basis of holding separationist views.

The connection between the respondents' claim and the transfer of the federal property is too remote and attenuated to constitute cognizable injury. All prior Establishment Clause challenges have been brought by plaintiffs whose personal stake was proximately connected with the governmental action challenged. These respondents are not directly involved with this transfer. The result is litigation which lacks the specificity and concreteness upon which this Court has insisted in its standing pronouncements, particularly in Establishment Clause cases. That respondents lack a particularized involvement with the specific government project challenged means that they seek no more than to air a generalized grievance about government.

Separationism is a political philosophy and not a religious belief. Thus, it cannot be a "spiritual stake" within the zone of interests of the Establishment Clause.

The court of appeals' drastic restatement of standing jurisprudence cannot be confined to Establishment Clause challenges. If accepted, any citizen will be able to utilize a federal court for debate with the sovereign over all manner of government choices and action.

The Third Circuit has adopted citizen standing despite this Court's consistent rejection of its theory and application. Combining "citizen" with "separationist" adds nothing more than a "hyphen" to this Court's sound reasons for rejecting any theory of citizen standing.

To adopt the court of appeals' standing hypothesis deprives the truly injured litigant of the right to complain about issues which affect him, in favor of a remote plaintiff who seeks to air a generalized grievance.

The novel and unprecedented grant of standing to these respondents violates the doctrine of separation of powers. It tilts the apportionment of power to the judiciary, offering the potential for intrusion on the powers of the other two coordinate branches of government.

ARGUMENT

I. Respondents Do Not Challenge Congressional Action Taken Pursuant To The Taxing And Spending Power Of The Constitution; Thus They Do Not Meet *Flast* Criteria.

While very few propositions about the doctrine of standing can be advanced with any confidence in their accuracy, there are two postulates which are fundamental and provoke no rebuke from prior decisions or the scholars. They are first, that the Article III "case or controversy" requirement is jurisdictional and constitutionally compelled for access to federal courts; and second, that to meet the case or controversy requirement the plaintiff must have a "personal stake" in the dispute that results from "injury in fact." *Schlesinger* v. *Reservists Comm. To Stop The War*, 418 U.S. 208, 218 (1974); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). In addition to these constitutional requirements, the Court has recognized the importance of discretionary prudential requirements. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979); *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

The more difficult tasks are to formulate precise standards for this personal stake requirement and to specify the contours of the additional policy constraints. This Court has on numerous occasions stated that to constitute personal stake the injury in fact must be immediate and direct, as opposed to remote, speculative, or attenuated. It must be the sort of injury that courts have traditionally found themselves suited to redress. *Baker* v. *Carr*, 369 U.S. 186, 198-99 (1962). Furthermore, the plaintiff must allege his own interests, rather than the interests of parties not before the court. *Tileston* v. *Ullman*, 318 U.S. 44, 46 (1943); *cf. Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The plaintiff's interest, however, cannot be purely "public" or ideological; a mere interest in an issue, no matter how longstanding, is not enough. *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972). The essence of Article III is that the courts are not to render advisory opinions. *Muskrat* v. *U.S.*, 219 U.S. 346 (1911).

The basic principles of standing are enunciated in this Court's premiere decision in *Flast* v. *Cohen*, 392 U.S. 83 (1968), which, like the present case, involved a challenge based upon the Establishment Clause of the Constitution. *Flast* explained that it was necessary to glance briefly at the substantive issues in order to determine whether they are issues which the plaintiff is entitled to raise. *Id.* at 102. Yet, the merits of the substantive claim are not the proper subject of the court's attention while resolving the threshold standing question. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 (1974). As in *Flast*, the issues here are Article III issues and not first amendment issues.

Most importantly, *Flast* holds that the injury-in-fact requirement of Article III is satisfied only by a taxpayer whose constitutional challenge meets two nexuses or logical links. First, there must be a nexus between plaintiff's status as a federal taxpayer[4] and the type of legislative enactment challenged. *Flast* at 102. Second, the taxpayer must link his federal taxpayer status to the nature of the asserted constitutional infringement. This is accomplished when the challenge to congressional action is to the taxing and spending power embodied in Article I, §8 of the Constitution. *Id.* at 103. Under *Flast*, the Establishment Clause is a limitation on the taxing and spending power and, as such, allows a taxpayer to challenge a federal statute on Establishment Clause grounds if the taxing and spending power is invoked. The flaw in respondents' claim, which is fatal to a grant of *Flast* standing, is their failure to challenge an exercise of congressional power under

[4] The amended complaint pleads the loss to Americans United's taxpayer membership in this way: "Each of these taxpayer members will be affected as though they were each a separate individual plaintiff in this action, and each individual member would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution" (J.A. 10, ¶12).

the taxing and spending clause; unlike *Flast*, the complained of activity finds its constitutional genesis in the Property Clause.

The Federal Property Act is an exercise of congressional power under the Property Clause, not an exercise of the taxing and spending power. The legislative history of the Act and the judicial opinions construing it identify Article IV, §3, cl. 2 as the constitutional authority for its enactment. S. REP. No. 475, 81st Cong., 1st Sess. (1949), *reprinted in* 2 U.S. CODE CONG. SERV. 1475-1476; *U.S.* v. *Cassiagnol*, 420 F.2d 868, 876 (4th Cir. 1970), *cert. denied*, 397 U.S. 1044 (1970); *Kern Copters, Inc.* v. *Allied Helicopter Services, Inc.*, 277 F.2d 308, 313 (9th Cir. 1960). The Property Clause states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.
> U.S. CONST. art. IV, §3, cl. 2.

This Court has acknowledged that the Property Clause gives Congress plenary power over the disposal of federal property, *Alabama* v. *Texas*, 347 U.S. 272, 277 (1954) ("The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation."); *Ashwander* v. *TVA*, 297 U.S. 288 (1936); *U.S.* v. *Gratiot*, 39 U.S. (14 Pet.) 526 (1840), including the power to make "all needful Rules and Regulations respecting" property owned by the United States, *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976)). Legislative history of the Act[5] reinforces its primary purpose as the efficient disposal of property no longer needed by the government, rather than as a public benefit or aid statute.

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[5] Congress' stated purpose in enacting this legislation was "to simplify the procurement, utilization and disposal of Government property" with the intention of "increased efficiency and economy of operation of the Federal Government." S. REP. No. 475, 81st Cong., 1st Sess. (1949), *reprinted in* 2 U.S. Code Cong. Serv. 1475, 1476.

Since plaintiffs failed to meet the *Flast* criteria, the district court correctly concluded that neither the organization nor the individuals had taxpayer standing (Pet. App. A43). The court of appeals agreed and that judgment is not questioned here.

II. Standing Cannot Be Predicated On A "Shared Individuated" Or "Personal Constitutional" Right To A Government That Does Not Establish Religion Without Overruling Every Major Standing Decision Of This Court.

Realizing that plaintiffs did not qualify as taxpayers, the court of appeals enunciated a novel theory of Establishment Clause standing to avoid *Flast's* impact. *Americans United for Separation of Church and State* v. *Department of Health, Education and Welfare*, 619 F.2d 252, 254 (3d Cir. 1980) [hereinafter cited as *Americans United*]. It first rechristened their interests "separationist", instead of "taxpayer":

> Plaintiffs have no reason to expect, nor perhaps do they care about, any personal tax savings that might result should they prevail. The crux of the interest at stake, the plaintiffs argue, is found in the Establishment Clause, not in the supposed loss of money, as such. As a matter of primary identity, therefore *the plaintiffs are not so much taxpayers as separationists, and their main concern is not a reduction in taxes, but their declared goal of separation of church and state. Americans United*, 619 F.2d 252, 261 (3d Cir. 1980) (Emphasis supplied).

The lower court used the "zone of interests" test which was formulated to interpret the "person aggrieved" language of the Administrative Procedure Act, 80 Stat. 392, 5 U.S.C. §702 (1966). That federal statute and the zone of interests test, which was designed for statutory and administrative agency challenges, cannot be employed to expand the scope of the Article III case or controversy requirement. *See, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). Yet, Judge Adams applied the test to the Establishment Clause and found that the concern of the organizational and individual respondents for separation of church and state was "arguably within the zone of interests protected by the Establishment Clause of the First Amendment . . . ." *Amer-*

icans United, 619 F.2d at 254. Even assuming the test could be correctly applied to the Establishment Clause, a separationist's concern, which is no more than the pursuit of a political philosophy, cannot be within any zone of interests protected by that Clause.

By far the most striking aspect of the majority's reasoning is its unheralded concept of a "shared individuated right" or "individuated interest" in the separation of church and state, *id.* at 261, 258. To be individuated, the court wrote, "'an interest need only be expressible in terms of the individual litigant's concrete satisfaction or experiences; but such satisfactions or experiences need not be *unique* to the litigant'." *Id.* The shared individuated interest in this case was the injury to plaintiffs' personal constitutional right of separation of church and state:

> The heart of plaintiffs' complaint is that the challenged governmental action caused 'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion'. *Americans United,* 619 F.2d at 261.

Plaintiffs were therefore deemed to have suffered injury "within the zone of interests protected by the Establishment Clause." *Id.* at 266.

This conception of "personal stake" violates fundamental standing principles. Article III demands injury. Judicial descriptions of what will constitute Article III injury have been adjusted from common law concepts of property loss to interests or rights of the plaintiff affected by the increasing reach of governmental action in modern times. Yet, this Court has never retreated from a notion of injury which is direct as differentiated from remote. The literature of standing has yielded injury formulations that speak of "distinct and palpable injury" *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 100 (1979); *Warth* v. *Seldin,* 422 U.S. 490, 501 (1975), and "particular concrete injury" *U.S.* v. *Richardson,* 418 U.S. 166 (1974). Federal courts serve only personal

sufferers, or "direct victims," *Gladstone*, 441 U.S. at 99, 100, who are faced with actual injury. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973).

A "shared individuated" or a "personal constitutional" right, *Americans United*, 619 F.2d at 261, 265, to a government which does not violate its Constitution fails to meet any conception of injury heretofore considered by this Court. Respondents advance no claim of personal suffering peculiar to themselves, *Gladstone*, 441 U.S. at 100.

The record does not support the court of appeals' conclusion. Despite this Court's admonition that "it is the responsibility of the complainant clearly to allege facts" to demonstrate a standing claim, not much can be gleaned from the complaint beyond the individuals' allegations that they are citizens and taxpayers.[6] *Warth*, 422 U.S. at 518. Respondents were given the opportunity through discovery to "particularize" the allegations of the Amended Complaint. *Warth*, 422 U.S. at 501. In connection with the district court's ruling on the college's Motion for Summary Judgment, the depositions and answers to interrogatories were considered. In granting the motion, the district court apparently felt that the respondents' standing did not appear and dismissed the Amended Complaint (as required by *Warth*, 411 U.S. at 502). Relabelling the plaintiffs' injury as primarily affecting their separationist beliefs indicates that the court of appeals did not consider the record.

The respondents' sworn testimony is vague about the challenge they mount and the nature of their injury. Some viewed their lawsuit as redressing agency action rather than challenging any statute. *See, e.g.*, Settembrini Dep. 27-29; Binns Dep. 24-30, and Doerr Dep. 23, "I'm not complaining about any law passed by Congress."

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[6] *See, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 110 which is critical of conclusory and abbreviated allegations in a complaint where standing is at issue.

One respondent saw his injury as exclusively taxpayer loss. He felt that federal tax funds "had been given away and therefore [he had] to make up the difference" (Gunn Dep. 12). Most agreed that their loss was shared in common with other taxpayers (Doerr Dep. 35, Binns Dep. 31). Mr. Settembrini testified that his injury "could be defined as general, it could also be defined as specific" (Settembrini Dep. 13-14).

None mentioned "injury" to separationist beliefs.[7] Doerr considered his injury the improper disposal of government property: "It belongs to the public and I'm part of the public" (Doerr Dep. 13). Respondent Settembrini objected to the transfer on "philosophical" grounds: "In my opinion, no Federal property should be dispersed (sic) to an institution which is not publicly owned" (Settembrini Dep. 12). Respondent Binns complained that the government had given away property of value which belonged to the class of taxpayers of which he was a member (Binns Dep. 31).

Aside from their convictions that their federal taxes might have been lower by an unknown amount and that the government had deprived the public of something of value, no respondent could explain how he might personally have suffered.

To reach its conclusion that plaintiffs could have standing on such facts, the court below adopted a false reading of this Court's opinion in *Flast* v. *Cohen*, 392 U.S. 83 (1968). It was suggested that the reason for *Flast's* reliance on its plaintiffs' taxpayer status was a "perceived limitation in the pleadings and nothing else," meaning that plaintiffs there had only al-

[7] The majority concluded without explanation that the organization's historic commitment to the goal of separation was identical to the individuals' concern. The individual respondents' connection to the organization by means of a paycheck proves employment, but certainly does not support the lower court's assumption that the organization's historic goals are personal to or embraced by the individuals.

leged taxpayer status,[8] *Americans United*, 619 F.2d at 262. If this had been the reason, the proper response in *Flast* would have been to require plaintiffs to amend their pleadings as this Court did in *Sierra Club* v. *Morton*, 405 U.S. 727, 735 n. 8 (1972); *see also*, *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Or perhaps it could have inferred, as the court of appeals did here, that those who mount Establishment Clause challenges are undoubtedly moved by separationist injury, even if it is nowhere mentioned in the complaint. The majority's claim that "[t]he underlying justification for according standing in *Flast*," *Americans United*, 619 F.2d at 262, was recognition that all citizens, taxpayers or not, may challenge expenditures on Establishment Clause grounds is simply mystifying.

The court below was correct in one regard. To constitute a personal stake, the injury need not be economic, but may instead be aesthetic or spiritual. *Americans United*, 619 F.2d at 257, citing *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *see also*, *Ass'n of Data Processing Serv. Org.* v. *Camp*, 397 U.S. 150, 154 (1970). On this premise the entire argument depends, for the "injury" to plaintiffs' separationist beliefs was concededly not an economic one. But the chain of reasoning that followed the correct initial premise was erroneous. The logic seemed to run: some non-economic injury constitutes personal stake, this injury is non-economic, therefore it constitutes personal stake. But, the purpose of a long line of precedents is precisely to define which non-economic injuries confer standing and which do not. *Sierra Club*, the very case upon which the court relied for its initial premise, struggled with the problem of differentiating intangible, but consitutionally cognizable in-

[8] The majority's supposition that this Court was limited to according taxpayer standing by the pleadings before it in *Flast* is in any event erroneous because the complaint filed in *Flast* variously identified those plaintiffs as citizens, voters, resident taxpayers of New York and a parent of school children attending public school. *Flast* v. *Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967); *See*, J.A. 10, ¶2 (Amended Complaint describing parties seeking standing here).

terests from generalized grievances about the nature of government. The careful formulation in *Flast* itself was wasted effort if the court below was correct that Establishment Clause standing is available generally.

The majority therefore erred, not in its premise that non-economic or even spiritual stake may be sufficient injury to raise an Establishment Clause claim, but rather in concluding that the interest asserted by these plaintiffs is a non-economic stake that qualifies, for Establishment Clause purposes, as personal.

Besides its strained reading of *Flast*, the court below offered several other justifications for conferring standing. Judge Adams alluded at several points to the unique importance of Establishment Clause guarantees, which in his view exempt this case from the general prohibition against citizen standing. This view no doubt led the court to phrase an oblique and ambiguous reference to the relationship of the merits to the plaintiffs' claim when evaluating standing. *Americans United*, 619 F.2d at 265. Standing analyses have considerably less involvement with the merits of the claim than the court of appeals implies. The court is guilty of having come to "premature evaluation of the merits of respondents' complaint" shifting the focus from the party. *Schlesinger*, 418 U.S. at 225. *See also, Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) ("Standing in no way depends on the merits of plaintiff's contention . . .").

The court of appeals simply has not applied any of this Court's standing jurisprudence. It has emptied Article III of any significance whatsoever in its drive to find standing for a citizen separationist, a theory which does not survive analysis in any event.

III. "Personal Stake" For Establishment Clause Claims Requires A Plaintiff To Have A Proximate Connection To The Governmental Action Challenged By Direct Involvement With The Specific Project; These Unaffected Citizens Seek A Federal Court To Debate Their Separationist Ideology.

A. "Personal Stake" In Establishment Clause Cases Has Been Well Defined By This Court; The Respondents Fail To Fall Within Any Acknowledged Categories.

This Court has recognized only three distinct types of "personal stake" in Establishment Clause cases: economic loss, taxpayer injury, and direct offense or affront to one's religion-free environment. None of these categories has included separationism or the naked right to freedom from the existence of constitutional violations. The injury alleged by Americans United is too remote and attenuated to fall into any of the categories of injury recognized by this Court as conferring a personal stake to raise Establishment Clause claims.

McGowan v. *Maryland*, 366 U.S. 420 (1961) is typical of the traditional losses which have been recognized in an Establishment Clause context. There, employees of the store which was operating in violation of Maryland's Sunday closing laws were indicted, convicted and fined; they defended in part on the grounds that the laws violated the Establishment Clause. This Court accorded them standing to raise that challenge. *Id.* at 430. In *Two Guys from Harrison-Allentown* v. *McGinley*, 366 U.S. 582, 592 (1961) a corporation's economic loss was sufficient for standing to challenge Pennsylvania's Sunday closing laws on Establishment Clause grounds. *See also, Board of Education* v. *Allen*, 392 U.S. 236, 239 n.5 (1968) which was a state law challenged by school board members on Establishment Clause grounds; standing was premised on the coercive nature of plaintiffs' dilemma: either to obey a law which they believed to be unconstitutional or to disobey a law and be faced with expulsion from their positions. Similarly, in the present case, a disappointed applicant for the property could probably challenge the transfer on Establishment Clause grounds. However, standing would be predicated on plaintiff's economic loss, and not on his right to live under a government which does not establish religion.

Second, a direct offense to the plaintiff's right to live and learn in a religion-free environment has been held to constitute a personal stake. This Court observed in a challenge to

school Bible reading: "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain." Standing was appropriate because ". . . school children and their parents . . . are directly affected by the laws and practices against which their complaints are directed." *Abington School District* v. *Schempp*, 374 U.S. 203, 225 n.9 (1963); *See also, Engel* v. *Vitale*, 370 U.S. 421 (1962), (parents of school children permitted to challenge classroom reading of state sponsored school prayer.) Finally, taxpayer loss is recognized as "personal stake". The plaintiffs in this case have already been shown to fail the test established by *Flast* v. *Cohen*, 392 U.S. 83 (1968).

Common to all three types of plaintiffs is the close, proximate connection between the "personal stake" and the governmental action challenged. In the economic injury cases a direct and immediate practical impact is obvious. Further, all taxpayer challenges to federal action have been brought by taxpayers in the vicinity of the allegedly unconstitutional project.[9] *Flast* involved a challenge filed initially in New York district court by taxpayers residing in New York City who wished to challenge the federal program's operation there.[10] *Tilton* v. *Richardson*, 403 U.S. 672 (1971), another Establishment Clause challenge to federal action, was brought in Connecticut district court by Connecticut residents challenging grants to specific Connecticut colleges. Personal stake, and therefore

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[9] In challenges to actions taken by states, the proximity requirement is satisfied because the action is brought by a state taxpayer. *See, e.g., Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

[10] The Supreme Court also noted that one plaintiff had children in New York schools, but deemed this extra allegation unnecessary. *Flast*, 392 U.S. 83, 85 n.1. This fact would be significant if the underlying claim were a direct affront to their right to public education in a religion-free environment, as in *Schempp*, but the underlying claim was instead expenditure of public monies.

standing to challenge government action, depends upon direct involvement with and proximity to the alleged harm.

Direct offense cases also illustrate the necessity for proximate plaintiffs. In *Schempp* and *Engel* plaintiffs were parents of school children directly confronted each day with the consequences of the government's choice to sponsor one set of religious beliefs. *See also, Stone* v. *Graham,* 101 S. Ct. 192 (1980) (*per curiam,* reversing Kentucky Supreme Court decision rejecting challenge by school children's parents to posting of Ten Commandments). This Court has seen only one such challenge that did not involve a direct offense to an individual's right to a religion-free environment, and for that reason it held the personal injury requirement unsatisfied. *Doremus* v. *Board of Education,* 342 U.S. 429 (1952) (challenge to Bible reading dismissed as moot because school children had graduated).[11] *Schempp,* upon which the majority below relies, does not, therefore, confer standing upon challengers as remote as the plaintiffs here.

Americans United and the individual plaintiffs have suffered no direct offense. Their connection to the asserted injury is too remote and too attenuated to constitute injury. Americans United operates at a distance, prefers to litigate at a distance, and suffers if at all in only the most indirect and attenuated way. This Court can only speculate about the impact on distant plaintiffs of the transfer of this federal property. But distance is only part of the problem. How are their lives affected? What religion-free environment, such as a classroom, is disturbed by direct daily confrontation of the governmental action challenged here? None. Unless this organization and these individuals would have had standing to complain in *Schempp* about Bible reading in the classrooms of

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[11] *Doremus* was distinguished on these grounds in both *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 225 n.9 (1963) and *McGowan* v. *Maryland,* 366 U.S. 420, 429 n.8 (1961).

Abington, Pennsylvania, they have no standing to complain about a transfer of surplus property in Phoenixville, Pennsylvania. In a true direct offense case, the plaintiff should not have to go out of his way to experience the insult's sting.

B. Respondents Do Not Possess A Personal Stake Because They Lack Proximate Connection With The Action Challenged; Since They Are Not Directly Involved With The Property Transfer The Court Is Deprived Of The Specificity Required In Article III Litigation.

Americans United has no greater involvement[12] in the transfer to Valley Forge Christian College than in any other grant it might happen to learn of by news report. These plaintiffs are undoubtedly interested in obtaining a far-reaching advisory opinion enunciating general principles prohibiting transfers of government property to institutions they believe to be primarily sectarian[13]. But their lack of involvement with the specific transaction violates the requirement in *Warth* v. *Seldin* that "the initial focus should be on a particular pro-

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[12] The record portrays in dramatic fashion the lack of anything more than litigation motivated by principle and not by harm. The individual plaintiffs, full-time employees and members of the organization's executive staff, initially decided to institute suit against the Government alone in the District of Columbia in December, 1976, after its executive director and his attorney concluded that the "sectarian" nature of the college disqualified it from receiving federal property (Gunn Dep. 36-38).

[13] The organization's conclusion that the college is sectarian and an ineligible transferee under the first amendment portrays the erroneous premise of the absolute separationist position. This Court has never held that being sectarian or church-related disqualifies an institution from any form of governmental assistance. *See e.g., Walz* v. *Tax Comm.* 397 U.S. 664, 679 (1970); *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952); *See also, Roemer* v. *Bd. of Public Works of Maryland*, 426 U.S. 736 (1976).

ject." 422 U.S. at 508 n. 18.[14] *See also, Arlington Heights.* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 262 (1977). Even where there is a demonstrated concern with the general issues and even where non-economic interest suffices to create personal stake, the plaintiff must allege and be prepared to prove involvement with the precise activity alleged to be illegal. Americans United's claim is no more personal or individualized than a claim by a conservationist club that its members are harmed by development of a parkland which the members do not allege they use. *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972) (aesthetic interest may be sufficient but "party seeking review must be himself among the injured").

Focusing on a particular project ensures the "necessary specificity . . . [that may be lacking] where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government." *Flast* v. *Cohen*, 392 U.S. 83, 106. One purpose of the standing limitation is "assur[ing] that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Article III therefore compels dismissal of suits that "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision. . . ." *U.S.* v. *Fruehauf*, 365 U.S. 146, 157 (1961). Absent such concrete adverseness, constitutional issues cannot be wisely decided. *See*, Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1024 (1924).

In addition to framing issues clearly for correct judicial resolution, specificity helps to ensure that the precedents this

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[14] *See also, Warth*, 422 U.S. at 507 (distinguishing cases that challenged particular projects); cf. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 n.26 (1979) (distinguishing between residents who have standing to challenge racially discriminatory "steering" practices in their vicinity from non-residents, who must demonstrate injury in fact some other way).

Court establishes will be narrowly drawn in accordance with traditional notions of "the nature of the judicial process." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 n.16 (1976). A specific statement of the plaintiff's actual "stake" results in a delineation of issues that avoids unwarranted anticipation of issues not necessarily presented. *Schlesinger* v. *Reservists Comm. To Stop the War*, 418 U.S. 208, 221-222 (1974); *Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). An overly broad opinion sweeps into the adjudication the rights of individuals who are not before the court and who are not necessarily situated similarly to the litigant who seeks to assert their claims.[15] *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *See also, Simon* v. *Eastern Kentucky Welfare Rts. Org.* 426 U.S. 26, 40 n.20 (1976). The prudential limitations that this Court has consistently recognized prohibit such results. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (collecting cases).

Specificity is particularly important in Establishment Clause cases since the wall of separation is not absolute but allows for "play in the joints," *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1971). The outcome is always dependent upon the nature of the particular recipient and the precise facts of the program in question. In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), which declined to rely upon a "composite profile" reflecting the characteristics of sectarian colleges generally, the Court said:

> Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients . . . . 403 U.S. at 682.

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[15] Brilmayer, *The Jurisdiction of Article III: Perspectives on the Case or Controversy Requirement*, 93 HARV. L. REV. 297, 308 (1979) [hereinafter cited as Brilmayer] (plaintiff "should be required to state [his claim] with specificity so that no overly broad precedent will threaten the rights of persons in different positions.")

Similarly, when the constitutionality of the statute involved in *Flast* was finally litigated in *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F.Supp. 1248, 1252 (S.D.N.Y. 1980), the New York district court refused to engage in speculation about whether the statute was facially unconstitutional due to its application in schools in other parts of the United States, stating that "a federal court must not issue decisions based on hypothetical situations." Instead, it based its decision upon an enormous body of accumulated evidence concerning operation of the statute in the New York schools, adding that "[t]he Court's constitutional ruling is, of course, confined to the fact situation specifically presented here." *Id.* at 1253.

Apparently seeking an advisory opinion about general limitations on transfers of surplus property, Americans United attempts to "[make] the actual defendant a pawn to be manipulated on a chess board larger than his own case." *Lenhard* v. *Wolff*, 443 U.S. 1306, 1312 (1979). The college is the pawn-victim called now to defend a right to retain its college by a remote non-involved stranger.

Sierra Club recognizes that intangible interests will in some instances suffice. But they must be the interests of the person requesting judicial intervention and must amount to more than an abstract concern with the legal issues raised. Since Americans United has no particular concern with this specific project, its Establishment Clause claim is too remote to support a personal claim of its own. The "harm" does not constitute pocketbook injury, direct affront, or taxpayer grievance because it is simply too attenuated. *Simon* v. *Eastern Kentucky Welfare Rts. Org.*, 426 U.S. 37 (1976); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973).

What then is the "spirtual stake" to which the court of appeals refers in writing about the plaintiffs' claim? The record does not support any construction which would permit this Court to hold that the individuals' *spiritual* beliefs had been

affronted; it is at most their ideological beliefs.[16] As separationists they complain about government activity from which they are detached and which has no impact. Separationism is not a religious belief within the "zone of interests" of the first amendment.[17] A Catholic or Jew may be a separationist; conversely an atheist or an agnostic may believe that the government should promulgate his own convictions. Separationism is a political hypothesis that addresses constitutional priorities; it is precisely the sort of interest that this Court's Article III decisions have explicitly and unambiguously held insufficient.[18]

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[16] In fact, this litigation was not brought by members who sought to vindicate the organization's self-ascribed goals, but by its paid employees. The instant litigation is no less an example of nonrepresentative public action than *Health Research Group* v. *Kennedy*, 82 F.R.D. 21 (D.D.C. 1979), since Americans United did not act on its members' initiative, nor did any member feel injured sufficiently to prompt him to join in the suit or communicate with the organization about it (Gunn Dep. 50). That the employees would have no difficulty "finding" other plaintiffs is more disturbing than curative (Doerr Dep. 12).

[17] In fact, if separationism were a religious belief, the first amendment might itself be accused of adopting a religious precept, which it does not. Another consequence of recognizing a citizen-separationist "spiritual" stake within the meaning of the first amendment, and of allowing challenges by organizations with long-standing separationist commitments, is involving the courts in determining the organization's sincerity on the subject of religious principle. The Court has consistently declined to engage in such inquiry, which would be necessary if ideological groups were to be evaluated in terms of the existence of such a stake. *Cf. Thomas* v. *Indiana Employment Security Division Board*, 49 U.S. L.W. 4343 (April 6, 1981). But separationism is a political philosophy, whose tenets are described in F. SORAUF, THE WALL OF SEPARATION (1976); *see particularly*, the chapters entitled "The Separationist Group" at 30 and "Goals and Strategies of the Separationist Groups" at 91.

[18] Plaintiffs may have an interest in the legal issue but not in the case itself. The majority's use of the phrase "'personal stake' in the

C. The Third Circuit's Reliance Upon "Shared Individuated Rights" Invites Article III Courts To Render Advisory Opinions About Citizen Grievances And Undermines Standing Completely.

The court below was apparently of the view that its radical reconstruction of standing law might be limited to Establishment Clause challenges. *Americans United*, 619 F.2d 252, 262. In fact, however, any theory capable of transforming an abstract concern about government illegality into a personal injury has potentially infinite reach. The majority opinion allows as much:

> The claim that individual citizens are entitled to judicial enforcement of their rights does not, of course, tell us exactly what Constitutional rights individuals have against the government. *Id.* at 265.

Precisely those who urge the Court to abandon the *Marbury* model of adjudication argue that "a part of the constitutional guarantees of freedom of speech and religion . . . [is] a right to complain of the existence of unconstitutional legislation." Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1369 (1973). This potential for abuse haunted Justice Harlan dissenting in *Flast*, 392 U.S. at 129 n. 18, and indeed, once the *Flast* test is cut loose from its moorings in the taxing and spending power, these problems materialize at once. Judge Adams may have been correct in stating that this Court's pronouncements on standing are not entirely clear,[19] but the one point on which this Court has never wavered is

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present controversy" is telling. *Americans United*, 619 F.2d 252, 254. The personal stake requirement mandates that a plaintiff have a personal stake not in litigating but in the outcome since it is only if a plaintiff's injury is likely to be redressed by the requested relief that the injury components of standing are met. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). *Duke Power Co.* v. *Carolina Environmental Study Grp., Inc.*, 438 U.S. 59, 74 (1978).

[19] While the *Flast* formulation has been criticized as "artificial" and "insupportable," Bogen, *Standing Up for Flast: Taxpayer and*

the issue here. Pique at governmental activity cannot, of itself, constitute injury in fact.

Citizen standing has never been recognized by this Court. *U.S.* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Ex parte Levitt*, 302 U.S. 633 (1937); *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). In the two major citizen cases in which standing to assert a constitutional violation was addressed, *Richardson* and *Schlesinger*, this Court declined to permit a complainant with no concrete injury to require the Court to rule on an important constitutional issue. In *Schlesinger*, this Court rejected a challenge to the Incompatibility Clause of Article I, §6, cl. 2 by an organization and its individual members who sued as representatives of reservists not members of Congress, taxpayers and citizens. The Court declared that a mere interest in litigating is not enough.[20] 418 U.S. at 226. *Richardson* similarly acknowledged that an undifferentiated preference is not injury. 418 U.S. 166, 177 (1974). In *Richardson*, a federal taxpayer sought to compel the publication of the CIA secret budget pursuant to Article I, §9, cl. 7. In addressing the issue of standing, the Court was faced with the question whether a commonly shared injury to plaintiff's ability to vote intelligently met Article III requirements. The Court held that it did not, since plaintiff had not alleged that he sustained any direct injury or was in danger of suffering any particular concrete injury as a result of the operation of the challenged statute.[21]

Citizen Standing to Raise Constitutional Issues, 67 KENTUCKY L.J. 147, 171 (1978-79), this Court has indicated no predisposition to retreat from its requirements. *See, U.S.* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

[20] *See also, American Jewish Congress* v. *Vance*, 575 F.2d 939, 943 (D.C. Cir. 1978).

[21] *Richardson* also implicitly denied citizen standing by acknowledging the viability of *Ex parte Levitt*, 302 U.S. 633 (1937). *Levitt*

Recognition of such "individuated injury" is at odds with the existence of *any* standing limitations.[22] Every clause in the Constitution offers as sound a basis as the Establishment Clause for inferring a derivative "interest" in the legality of government action. Indeed, a "shared individuated right" is nothing more than a "generalized grievance." For every violation, one can construct a "shared individuated" grievance among the entire citizenry that the violation was committed. But such outrage is, at most, an "external preference" about the rights of others, and not a personal preference constituting injury in fact.[23]

If citizen-separationists have an interest in Establishment Clause cases, then citizen-abolitionists likewise have a stake in eighth amendment cases and citizen-egalitarians have a stake

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challenged the constitutionality of Justice Black's appointment as an Associate Justice since he voted for an increase in retirement benefits of justices. The appointment was alleged to violate the Emoluments Clause of the Constitution. The Court held Levitt's claim insufficient because, "whatever [his] injury, it was one shared 'with all members of the public'." *Richardson*, 418 U.S. at 178.

[22] For example, Establishment Clause standing would be enormously enlarged. The outcome of previously decided cases would be jeopardized. *See, e.g., Murray* v. *Morton*, No. 80-1475 (D.D.C. Jan. 12, 1981), in which the court denied standing to two individual federal taxpayers and an organization, the Society of Separationists, who claimed that payment of salaries to the Senate and House Chaplains violated the Establishment Clause, since they alleged no interest "other than their views with respect to religion, to distinguish themselves or their personal stake in the outcome from that of any one of the population who pay taxes." *See also, Citizens Concerned for Separation of Church and State* v. *City & County of Denver*, 628 F.2d 1289 (10th Cir. 1980) and *Brashich* v. *Port Authority of New York*, 484 F. Supp. 697 (S.D.N.Y. 1979).

[23] R. Dworkin, TAKING RIGHTS SERIOUSLY 234 (1977) (distinguishing between "personal" and "external" preferences); see also, Brilmayer, 93 HARV. L. REV. at 311 (1979).

in fourteenth amendment cases. A long line of precedents beginning with *Frothingham* v. *Mellon*, 262 U.S. 447 (1923) would have been differently decided. *See, e.g., Rakas* v. *Illinois*, 439 U.S. 128 (1978) (no standing to raise fourth amendment objection to search of property in which defendant had no possessory interest); *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978) (no standing to challenge the United States' cooperation in programs with foreign governments); *See also, Gilmore* v. *Utah*, 429 U.S. 1012 (1976) (eighth amendment).[24] For any clause, there are those who keenly sense the clause's infringement. But ideological interest in an issue is, of course, not enough.[25]

The apparent motive for the Third Circuit's willingness to disregard this Court's consistent admonishment that ideology is not a personal stake was eagerness to reach the merits. Judge Rosenn suggested that, given the longstanding commitment of the judiciary to enforcement of first amendment rights, the lack of a plaintiff with taxpayer or other status would result in hearing this claim at the request of a citizen-separationist. *Americans United*, 619 F.2d 252, 268 (Rosenn, J., concurring). There are three problems with this justifica-

[24] Other cases include *e.g., Galliot* v. *HEW*, 464 F.2d 598 (5th Cir. 1972), *cert. denied*, 409 U.S. 1060 (1972); *Sharrow* v. *Brown*, 447 F.2d 94 (2d Cir. 1971) and *Morrison* v. *Callaway*, 369 F. Supp. 1160 (D.D.C. 1974); *see also, Gravel* v. *Laird*, 347 F. Supp. 7 (D.D.C. 1972); *Pietsch* v. *President*, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); *Velvel* v. *Nixon*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

[25] While it might on some facts be possible to argue that willingness to incur legal costs itself proves the existence of an "injury in fact," this argument has never won approval by the Court and could not without undercutting Article III limitations in their entirety. Even this argument is unavailable where, as here, plaintiffs' complaint seeks attorneys fees. Moreover, it is doubtful that staff employees of Americans United are personally obligated for legal fees.

tion. First, it is not clear whether there is another plaintiff who might have a traditional stake in the suit. As suggested earlier in this discussion, there may potentially be other individuals who have suffered traditional personal harm. If such individuals have not been identified, this may mean only that the case is not yet ripe for judicial resolution; this Court should exercise restraint in anticipating constitutional questions unnecessarily. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

Second, the vesting of a "personal stake" in citizen-separationists can ultimately only serve to divest truly injured plaintiffs of control over litigation affecting their rights. One function of the standing doctrine is to keep litigation in the hands of the individuals most closely affected on the theory that they are their own best representatives. *Id.*, at 509, 515. Yet, if the plaintiffs here have standing, then ideological challengers will be able to sue even in situations where traditional plaintiffs exist. Once the standing threshold is satisfied, the existence of "better plaintiffs" becomes irrelevant. *Flast* at 98 n.17. Thus the claims advanced in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), could well have been initiated by an organization with a separationist commitment rather than an individual indicted for violation of Sunday closing laws. The same is true of *Schempp* and *Engel*. It is of dubious fairness to the individuals immediately affected to allow ideological litigants to raise (and perhaps foreclose) such challenges on the merits.[26] On its surface the lower court's theory appears merely to provide that the best plaintiff available will be allowed to raise constitutional issues: "Americans United is likely to be the best available plaintiff." *Americans United*, 619 F.2d at 268 (Rosenn, J., concurring). But, in the long run the result will be that the best plaintiff will find control wrested from his grasp.

[26] Brilmayer, 93 HARV. L. REV. at 306.

Finally, this Court has indicated that the nonexistence of a traditional plaintiff is simply irrelevant:

> In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. *U.S.* v. *Richardson*, 418 U.S. at 179 (1974).

The judicial function is to litigate "cases and controversies" touching the rights of individuals, not to make abstract declarations of constitutional law. *Muskrat* v. *U.S.*, 219 U.S. 346 (1911). A court that simply accepts whatever plaintiff comes forward in its eagerness to reach the merits of a constitutional question risks violating traditionally accepted principles of separation of powers.

IV. Citizen Or Citizen-Separationist Standing Violates The Doctrine Of Separation Of Powers.

By locating these plaintiffs' philosophical beliefs about the proper relationship between church and state within the zone of interests arguably protected by the Establishment Clause, the majority opinion in *Americans United* equates political discomforture with the personal stake required to call upon judicial power. The failure of the court below to offer any reasoned distinction for limiting this type of standing to Establishment Clause cases invites self-appointed representatives of the public interest to raise all manner of grievances against the government whether under the Constitution, federal statute or regulations. Judge Adams focuses on the plaintiffs' unalleged identity as separationists and the "declared goal of separation of church and state" as the reason these plaintiffs should litigate this case. *Americans United*, 619 F.2d 252, 261 (1980). The apparent justification is the hypothesis that regardless of whether their own personal interests are at stake, citizens must have recourse other than the political process for the vindication of their political beliefs. *Id.* at 265 n. 79.

The boundless nature of the standing formula offered by the majority would recognize a mass of heretofore unreviewable claims; it carries the potential for ". . . a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government." *U.S.* v. *Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring). "[G]overnment by injunction," where the citizenry judicially monitors the performance of the Executive and Legislative branches, violates the doctrine of separation of powers.

Separation of powers[27] is implied from the general structure of the first three Articles and acknowledged unswervingly throughout the cases as an underlying premise of the case or controversy requirement. This Court has consistently recognized, in rejecting citizen claims as the basis for standing, that the functions of government under our system are apportioned so that no one of the three departments may assert authority over the other branches. To decide legal issues in the absence of a personal claim "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department — an authority which plainly [the courts] do not possess." *Frothingham* v. *Mellon*, 262 U.S. 447, 489 (1923). *See also, Ex parte Levitt*, 302 U.S. 633, 634 (1937) (power of judicial review should not be invoked unless plaintiff adequately shows direct injury resulting from the challenged action, and not merely "a general interest common to all members of the public"). This Court continues to cite reluctance to encroach on the powers

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[27] While not expressly mentioned in the Constitution, the structure of the first three articles granting enumerated powers to the Congress, Executive and Judiciary strongly suggest the presence of the doctrine of separation of powers. *See, Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) in which the Court first described the role of the Judiciary to exercise its jurisdiction only in cases properly before it. *See also*, Comment, *Standing, Separation of Powers, and the Demise of the Public Citizen*, 24 AM. U. L. REV. 835, 839 n. 12 (1975).

of the other branches as a fundamental premise of justiciability. In *Flast*, the Court specifically explicated the case or controversy requirement as based in part on the role assigned to the judiciary in a tripartite allocation of power "to assure that the federal courts will not intrude into areas committed to the other branches of government." 392 U.S. 83, 95 (1968).

Judge Adams' creation of a theory of a personal constitutional right to a government which conforms to the Constitution rides roughshod over the apportionment among the judiciary and the other branches. All citizens have an interest in seeing that the government behaves constitutionally since the powers of government were initially agreed to and limited by them. However, this expectation simply does not compel the conclusion that citizens have the right to invoke the judicial process to accomplish this end. This Court has acknowledged that allowing each and every citizen to litigate constitutional issues of public interest simply because citizens are the document's ultimate beneficiaries is a limitless exercise which ultimately distorts the judicial process and usurps the functions of the other co-equal branches. *U.S.* v. *Richardson*, 418 U.S. 166, 189 (1974); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974). The *Schlesinger* Court, recognizing that a significant alteration of the allocation of power between governmental branches is an unavoidable ramification of a grant of citizen standing, rejected plaintiffs' asserted claims, and stated that:

> [t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.' *Schlesinger, id.* at 222.

This Court has observed that where Congress has taken action to limit prudential restraints on the exercise of Article III jurisdiction, there is a role for increased standing. *Warth* v. *Seldin*, 422 U.S. 490, 501, 514 (1975). Congress has shown no

inclination to do this in the Establishment Clause context.[28] As this Court has warned, "[r]elaxation of standing requirements is directly related to the expansion of judicial power . . . with a shift away from a democratic form of government." *U.S.* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). This potentially weakens democracy. Courts realize that they like Congress, set public policy, but as unelected bodies not directly responsive to the people, their policy functions must be carefully circumscribed.[29]

CONCLUSION

Petitioner, Valley Forge Christian College, respectfully prays the Court to reverse the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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[28] To the contrary, to the extent that the Congress has considered judicial jurisdiction to hear cases raising Establishment Clause claims, it has done so through proposals to invoke its power under Article III, §2 to restrict jurisdiction to hear school prayer cases. *See, e.g.*, S. 2070 96th Cong., 1st Sess. (1979).

[29] A. BICKEL, THE LEAST DANGEROUS BRANCH, 16-23 (1962).